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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Application by BellSouth Corporation, BellSouth	)	
Telecommunications, Inc., and BellSouth Long	)	CC Docket No. 97-208
Distance, Inc. for Provision of In-region	)	
InterLATA Services in South Carolina	)	

REPLY COMMENTS OF AT&T CORP. IN OPPOSITION TO BELLSOUTH'S SECTION 271 APPLICATION FOR SOUTH CAROLINA

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AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to the application of BellSouth Corp. et al. ("BellSouth") for authorization to provide interLATA services originating in South Carolina.

INTRODUCTION AND SUMMARY OF ARGUMENT

The comments overwhelmingly confirm that BellSouth's application fails to demonstrate compliance with the requirements of section 271, and must be denied. BellSouth has not begun to comply with many of its most important checklist obligations, including its duty to make the elements of its network available to competitors on reasonable and nondiscriminatory terms and at cost-based rates, to make services available for resale without undue restrictions and at a proper discount, and to provide nondiscriminatory access to its operations support systems. These conclusions are borne out by the comments not only of numerous potential entrants that have sought interconnection agreements with BellSouth, but of the United States Department of Justice and the South Carolina Consumer Advocate ("Consumer Advocate").

These conclusions are further supported by the recent decision of the Florida Public Service Commission, which voted on November 3, 1997, to accept, with some modifications, the detailed recommendations of its staff that BellSouth has not complied with numerous

checklist items.[1] In addition, both the Alabama and the Georgia Commissions have issued orders holding that BellSouth has not yet demonstrated that the functions of its operations support systems are available to competitors on nondiscriminatory terms and conditions. Because it is undisputed that BellSouth uses the same processes and systems throughout its region for providing access to its network elements and its operations support systems,[2] these recommendations and orders from other BellSouth states lend additional and powerful support to the conclusion that BellSouth has failed to meet its evidentiary burden under section 271.

Indeed, apart from a few brief and general endorsements of BellSouth's application, the only support BellSouth receives is from two other RBOCS (Ameritech and U S WEST), and from the South Carolina Public Service Commission (SCPSC). None of these commenters purports to provide a comprehensive analysis, however, and each of their conclusions is thoroughly refuted by the comments of the Department of Justice, the Consumer Advocate, and potential entrants, and by the recent findings of other state commissions.

Accordingly, Part I of these reply comments will address some of the principal checklist items which the comments make plain remain unavailable from BellSouth. In particular, Part I will discuss the commenters' evidence that BellSouth has failed both to define how it proposes

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[1] Memorandum of Fla. PSC Staff, Docket No. 960786-TL, Consideration of BellSouth Telecommunications, Inc.'s Entry into InterLATA Services Pursuant to Section 271 of the Federal Telecommunications Act of 1996, (Oct. 22, 1997) ("FPSC Staff Mem.") (included as Attachment A hereto), aff'd in part, Florida PSC, Special Commission Conference Vote Sheet, (Nov. 3, 1997) (included as Attachment B hereto).

[2] See, e.g., FPSC Staff Mem. at 165-66 (quoting BellSouth witness Milner's concession that BellSouth uses the same systems and processes throughout its region); Order Addressing Statement and Compliance With Section 271 Of The Telecommunications Act of 1996, S.C. PSC Docket No. 97-101-C, Order No. 97-640 (July 31, 1997) at 20 ("SCPSC Compliance Order").

to make combinations of network elements available to CLECs so that they can recombine them, and to demonstrate that it has the capacity to provision and bill for the use of such elements. Part I will also address the overwhelming evidence -- fully supported by the decisions of the Alabama, Florida, and Georgia Commissions -- that BellSouth has failed to provide nondiscriminatory access to its OSS.

While these two aspects of checklist non-compliance are fundamental and fully sufficient in themselves to warrant rejection of BellSouth's application, in ruling on this application the Commission should not stop there. As Part I further explains, it is essential that the Commission also should address and reject BellSouth's contention that the assertion of the SCPSC that BellSouth's UNE prices are cost-based is "conclusive" and requires complete deference from this Commission. No case could better illustrate the need for this Commission to exercise its independent obligation to make findings with respect to each item of competitive checklist -- including those that relate to pricing -- because here the record indisputably reveals that the SCPSC applied no cost methodology whatsoever in setting UNE rates and BellSouth did not provide the complete cost studies to which a proper methodology should have been applied. Finally, Part I addresses BellSouth's failure to offer its services for resale without unlawful restrictions and at a discount rate that accounts for reasonably avoided costs, and demonstrates how the comments overall refute the SCPSC's contrary conclusions concerning checklist compliance.

Because each of these reasons is sufficient grounds on which to reject BellSouth's application, the Commission need not address whether BellSouth is eligible to proceed under Track A or Track B. Part II nevertheless demonstrates that AT&T, for one, is seeking to

become a predominantly facilities-based carrier in South Carolina and that, in light of BellSouth's conduct to date, AT&T's efforts to secure checklist compliance constitute reasonable steps toward entry for purposes of foreclosing Track B. Part II also demonstrates that the SCPSC's contrary conclusion is based on its failure to acknowledge that competitors that provide service predominantly through the use of unbundled network elements count as facilities-based providers under the Act, and refutes Ameritech's argument concerning the significance to be accorded the absence of implementation schedules in interconnection agreements.

Part III principally responds to Ameritech's argument that the Commission should abandon its rule preventing BOCs from exploiting their monopoly position through the preferential marketing of the services of their long distance affiliates. Finally, Part IV responds briefly to the SCPSC's claims that BellSouth's entry would serve the public interest.

I. THE COMMENTS CONFIRM THAT BELLSOUTH HAS FAILED TO COMPLY WITH ITS CHECKLIST OBLIGATIONS

The comments of new entrants, the South Carolina Consumer Advocate, and the Department of Justice, as well as the recent orders of the Alabama, Florida and Georgia Public Service Commissions, all confirm that BellSouth's failure to comply with its checklist obligations is pervasive and profound. Of the few commenters that express support for BellSouth's application, none attempts a complete assessment of checklist compliance. The record before this Commission thus overwhelmingly demonstrates BellSouth's failure to comply with the competitive checklist.

A. BellSouth Has Not Made Available Nondiscriminatory Access To Unbundled Network Elements

The Commission's prior rulings confirm that to open its markets and comply with the checklist, the petitioning BOC must satisfy the Act's requirements for all three means of local entry: resale, unbundled network elements, and interconnection of networks. Ameritech Michigan Order ¶¶ 13, 21.[3] The comments demonstrate that BellSouth has resisted, rather than implemented, its obligation to permit local entry via unbundled network elements. This is true both for entrants that would use elements in combination as well as for entrants that would use individual elements.

With respect to network elements, Ameritech and U S WEST only argue that, in light of the Eighth Circuit's rehearing decision, BellSouth's application cannot be rejected due to BellSouth's failure to provide access to existing combinations of network elements. Ameritech Comments at 8-11; U S WEST Comments at 15. But see MCI Comments at 58. But this argument does not address the fundamental issue, set forth in the Department's Evaluation and in many other comments, whether BellSouth has provided CLECs with the ability to combine network elements to provide customers with telecommunications services.[4] Similarly, with the exception of one brief comment by the SCPSC discussed below, BellSouth's supporters also

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[3] In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997) ("Ameritech Michigan Order").

[4] E.g., DOJ Evaluation at 16-25; AT&T Comments at 19-23; MCI Comments at 58-62; LCI Comments at 10-15; CompTel Comments at 9-15.

overlook BellSouth's failure to demonstrate that it has the capability to provide non-discriminatory access to unbundled network elements.

1. As the Department of Justice makes clear, BellSouth's application is deficient with respect to combinations of network elements in two distinct and important ways. BellSouth's "interconnection agreements and its SGAT fail to state adequately the terms and conditions under which BellSouth will provide unbundled elements so that they may be combined, and BellSouth has also failed to demonstrate that it has the practical ability to provide unbundled elements to requesting carriers with satisfactory performance in commercial quantities." DOJ Evaluation at 16. For each of these reasons, BellSouth's application must be rejected.

a. First, BellSouth's SGAT "is completely unclear" as to the network elements it will "physically deliver" to new entrants, and it fails to identify the "software modifications" that it purportedly will perform to enable the elements to function together. Id. at 20-21. "Even more fundamentally," the SGAT fails to "specify what combinations of network elements it proposes to separate and require the CLEC to combine," fails to state what "charges, if any" may apply, and thus leaves "critical details" simply open to "negotiation." Id. at 21. Indeed, to the extent any methods and procedures are hinted at, BellSouth apparently "would require a new entrant to collocate its own facilities in a central office" rather than permit the "less costly" option of "supervised access to BellSouth's network" to combine elements "without contributing any facilities of their own," as the Eighth Circuit's opinion permits CLECs to do. Id. at 22; see id. at 17-18 (discussing Eighth Circuit's Order). For all of these reasons, BellSouth's application is devoid of any serious effort to set forth how it intends to comply with its statutory responsibility to provide unbundled network elements so that they may be combined.

b. Second, BellSouth has failed to demonstrate that it has "the practical capability of providing unbundled elements in a manner that permits them to be combined." Id. at 23. In this regard, the Department notes that in the absence of any defined procedures for allowing CLECs to combine elements, it is impossible to know whether BellSouth has the technical capability to implement the procedures that may ultimately be required. Id.

The record also demonstrates that BellSouth lacks the capacity today to provide nondiscriminatory access either to individual or to combined network elements. In particular, BellSouth is unable to provide reasonable and nondiscriminatory access to physically separated loops.

ACSI's comments, for example, set forth in detail serious BellSouth errors -- including delayed installations, service outages during cutovers "routinely exceeding 4 hours," and service quality problems (volume losses, false busy signals, and even crossed lines) as well as post-cutover disconnections -- which have led to the loss of customers and the filing of "two formal complaints," one with this Commission and one with the Georgia PSC. ACSI Comments at 29-39; Falvey Aff. at ¶¶ 27-42.[5] Sprint similarly reports that it "has experienced problems in virtually all phases of the customer activation (or "cutover") process for unbundled loops," as well as provisioning and billing problems after cutover, leading Sprint to file a formal complaint with the Florida PSC. Sprint Comments at 15-18; Closz Aff. ¶¶ 64-84. WorldCom has experienced similar cutover problems, with customers out-of-service for "unacceptably long period[s]" and with delays due to "limits [on] the number of cutovers that [BellSouth] will

[5] Remarkably, the SCPSC held that these serious BellSouth service problems were irrelevant to the issue of BellSouth's checklist compliance. See AT&T Comments at 47 n.27.

perform and the hours in which it will perform them." WorldCom Comments, Ball Decl. ¶ 18. And Intermedia comments that BellSouth still has not provisioned the digital loops for data service that it requested over 14 months ago, and also has significantly delayed provisioning of unbundled DS-1s. Intermedia Comments at 22-23, 37-39.

The chronic and serious problems that CLECs have experienced in obtaining unbundled loops are important not only for what they demonstrate with respect to that individual checklist item, but for what they reveal about BellSouth's otherwise-inchoate proposal to require CLECs to reconnect a physically unbundled loop with an unbundled switch port in collocated space.[6] As the Department of Justice notes, such a collocation requirement "would entail substantial cost and delay for CLECs wishing to use combinations of elements." DOJ Evaluation at 25. Indeed, the extraordinary control that a collocation requirement would give BellSouth over the pace of CLEC entry and the quality of CLEC service in such a scenario, together with the excessive costs and provisioning delay it would impose, would render combined elements unavailable as a practical matter. At a minimum, on this record, such evidence alone is sufficient to foreclose any finding that BellSouth has the capability today to provide nondiscriminatory access to unbundled loops or to combinations of network elements via collocation.

Beyond these defects with BellSouth's collocation proposal, the record also establishes that BellSouth lacks the technical capabilities of providing combinations of network elements no matter how those elements are combined. For example, no matter who does the combining of

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[6] Of course, the Eighth Circuit's decision makes plain that BellSouth may not condition access to combinations of UNEs on the purchase of collocated space and the network equipment (e.g. frames and cross-connects) needed to reconnect loops and switch ports. See DOJ Evaluation at 17-18, 22; AT&T Comments at 22.

elements, BellSouth is uniquely responsible for providing CLECs with the usage and billing data associated with use of unbundled elements. But BellSouth cannot yet provide this. The Florida PSC staff found it "impossible to conclude that [BellSouth] has the capability to generate mechanized billing statements for usage sensitive UNEs" such as local switching and local transport. FPSC Staff Mem. at 109, 174, 182-83. In particular, with respect to local switching, the Florida staff noted that BellSouth lacks the ability to generate "access usage detail," despite AT&T's having "filed a motion with this [Florida] Commission to compel [BellSouth] to provide the requested billing detail." Id. at 109. Thus, even if BellSouth had provided CLECs with reasonable and nondiscriminatory means for combining network elements, BellSouth lacks the ability to generate mechanized bills recording CLEC usage of network elements or to provide the access usage information that CLECs would need as the access provider to bill end-users. Id.; see also id. at 104-06; AT&T Comments at 10-14 (describing BellSouth's refusal to provide billing detail for intra-state access, and inability to provide billing detail for interstate access and for reciprocal compensation); CompTel Comments at 16-18.

In addition, as AT&T set forth in its initial comments, BellSouth's performance to date demonstrates its inability and unwillingness to provide CLECs with the all of the features, functions, and capabilities of the local switching element. AT&T Comments at 14-19. Most notably, BellSouth refuses to provide AT&T with the ability to order features (e.g. call blocking) individually or in packages other than as BellSouth currently offers them, is seeking to impose unlawful surcharges for the use of vertical features, and has yet to implement customized routing to AT&T's operator services and directory assistance centers -- a failing that BellSouth now unlawfully exploits by placing its own brand on the OS/DA services that it resells to AT&T.

Id. For each of these reasons as well, BellSouth has failed to demonstrate the willingness or capability fully to provision unbundled network elements.

2. While the Florida PSC concluded from BellSouth's myriad problems in furnishing network elements that BellSouth had not met its checklist obligations, the SCPSC's comments dismiss these concerns on the theory that entrants are asking "the Commission to hold BellSouth to a standard of operational perfection that is not found in the Act and cannot reasonably be expected of any carrier." SCPSC Comments at 12. Yet in the only example the SCPSC actually discussed -- Sprint's problems ordering unbundled loops -- the SCPSC assumed that the problems had been amicably resolved and that Sprint had not filed a formal complaint -- neither of which is true. Compare SCPSC Comments at 12 with Sprint Comments at 15-18 & n.47, Appendix to Sprint Comments (Florida Complaint), and Closz Aff. ¶ 97.

In short, not only has BellSouth failed to establish reasonable and nondiscriminatory terms and conditions governing CLEC access to combinations of network elements, it has failed to develop provisioning and billing capabilities that are essential regardless of whether CLECs use an individual network element or recombine two or more of them. The comments thus reveal BellSouth's complete failure to comply with its statutory obligation to provide nondiscriminatory access to BellSouth's network elements on an unbundled basis.

B. BellSouth Has Not Made Available Nondiscriminatory Access To Operations Support Systems

Those few comments filed in support of BellSouth's application are conspicuously silent on the issue of operations support systems, and for good reason: Not only is the record replete with evidence of BellSouth's failure to provide nondiscriminatory access to OSS, but even

BellSouth has conceded that it cannot meet the Commission's requirements as set forth in the Ameritech Michigan Order. BellSouth Br. 20.[7]

In fact, of BellSouth's various supporters, only the SCPSC broaches the topic of OSS, and then only in passing. The SCPSC's entire discussion of OSS (to which fully one-fourth of this Commission's extensive Ameritech Michigan Order is devoted) consists of two sentences. Noting that AT&T has "argued that BellSouth's LENS OSS interface has adequate [sic] capacity to meet CLEC's needs," the SCPSC then dismisses the argument in light of "BellSouth's evidence that its OSS interfaces . . . have abundant excess capacity today" and because "AT&T has provided no credible evidence to back up its claims that unspecified levels of future demand will overwhelm BellSouth's systems." SCPSC Comments at 13. This cavalier treatment of a critical checklist issue captures in a nutshell the inadequacy of the SCPSC's review.

First, with respect to this particular sub-issue concerning OSS capacity, the SCPSC's analysis is as wrong as it is superficial. LENS, which even BellSouth admits is not intended for use by large CLECs as an ordering interface (Stacy OSS Aff. ¶ 46), has an alleged ordering

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[7] U S WEST is plainly incorrect in its claim (at 16) that the Ameritech Michigan Order has "no binding impact" on this application because it is not a rulemaking but an "adjudicative order" that applies only to Ameritech. The Supreme Court has rejected that view and held that an agency "is not precluded from announcing new principles in an adjudicative proceeding," which can "generally provide a guide to action that the agency may be expected to take in future cases." NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); see also Michigan Wisconsin Pipe Line Co. v. FPC, 520 F.2d 84, 89 (D.C. Cir. 1975) ("There is no question that [an agency] may attach precedential, and even controlling weight to principles developed in one [adjudicatory] proceeding and then apply them under appropriate circumstances in a stare decisis manner."). Indeed, the Commission's adjudication here "must . . . be consistent with prior adjudications" like the Ameritech Michigan Order (absent a "reasoned basis" for departure) in order to constitute reasoned decisionmaking. Kelley v. FERC, 96 F.3d 1482, 1489 (D.C. Cir. 1996) (emphasis added). Accordingly, the Commission's standards announced in the Ameritech Michigan Order apply fully to this case.

capacity regionwide of a mere 1,000 orders per day (an average of only about 110 orders per state) -- inadequate by any measure to support meaningful local competition. Indeed, because LENS is not even intended for use by large CLECs as an ordering interface, its "capacity" in that respect, as far as AT&T and other potentially large CLECs are concerned, is zero.

Furthermore, as a pre-ordering interface, LENS has been proven to lack adequate capacity by events that postdate the South Carolina hearings. After those hearings, when AT&T began its controlled market entry, its modest increases in pre-ordering transactions led to complete and repeated outages of the LENS system over an extended period of time, and demonstrated beyond question that BellSouth's claims that LENS had adequate capacity to meet projected demand were false. See AT&T Comments at 37; Bradbury Aff. ¶¶ 251-57. The SCPSC's assessment of the capacity of LENS as a preordering interface is thus, at best, uninformed.

Second, and more fundamentally, the SCPSC's Comments do not begin to address the range of significant issues that are encompassed within the Commission's broad two-part inquiry as set forth in the Ameritech Michigan Order. Although the SCPSC did not have the benefit of that Order at the time that it chose to adopt virtually verbatim BellSouth's write-up of the OSS issues, it did have that Order for two months prior to writing its comments. The SCPSC offers no good reason why it chose not even to mention that Order in its comments, let alone to explain whether that Order affected its assessment of BellSouth's OSS compliance in any way. Instead the SCPSC -- like BellSouth -- seems content to treat that Order as if it did not exist. At a minimum, it seriously undercuts the SCPSC's claim to any deference.

The SCPSC's cursory treatment is all the more striking given the recent decisions of other state commissions, the Department of Justice's Evaluation, and the detailed comments on OSS issues submitted by numerous new entrants. This evidence leaves no doubt that BellSouth has not yet even deployed all of the interfaces needed to provide nondiscriminatory access to OSS, let alone demonstrated that it is providing such access today.

For example, since BellSouth filed its application for South Carolina with this Commission, the Alabama PSC has concluded that it would be "premature" to approve BellSouth's Alabama SGAT, in significant part because "BellSouth's OSS interfaces must be further revised to provide nondiscriminatory access to BellSouth's OSS systems" and "to establish performance standards . . . so that BellSouth's provisioning of service to its competitors can be meaningfully compared to BellSouth's internal performance."[8] Similarly, the Georgia PSC decided not to approve BellSouth's revised Georgia SGAT but merely to let it take effect, and did so "especially in view of the additional development needed for such [checklist] items as OSS electronic interfaces and performance standards," the successful completion of which "will be critical to any future endorsement of in-region interLATA entry by BellSouth."[9] The approach of these state commissions -- each of which plans to hold

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[8] Alabama Public Service Commission, In re: Petition for Approval of a Statement of Generally Available Terms and Conditions pursuant to §252(f) of the Telecommunications Act of 1996 and notification of intention to file a Petition for In-region interLATA Authority with the FCC pursuant to 271 of the Telecommunications Act of 1996, Docket 25835, Order at 7-8 (Oct. 16, 1997).

[9] Georgia Public Service Commission, Interim Order Regarding Revised Statement, In re: BellSouth Telecommunications, Inc.'s Revised Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Docket No. 7253-U, Order at 4 (Oct. 30, 1997).

additional workshops and hearings devoted exclusively to OSS issues -- stands in stark contrast to South Carolina's rush to judgment.

More telling still, however, is the ongoing work in Florida. There, the Florida PSC staff has recently issued an extensive assessment of BellSouth's OSS that expressly takes account of this Commission's rules and orders and catalogues in significant detail many of the principal defects with BellSouth's OSS access both for unbundled network elements and for resale. FPSC Staff Mem. at 112-130 (UNE), 259-288 (resale).

For example, the Florida PSC staff notes that BellSouth has not provided "a pre-ordering interface that is integrated" with its EDI interface, and "has not provided the technical data to requesting carriers" to permit them to integrate LENS with their ordering systems. FPSC Staff Mem. at 128. The staff also identified numerous important ways in which LENS fails to offer CLECs pre-ordering functionality comparable to what BellSouth provides to itself. Id. at 111-116, 264-277. Similarly, the staff sets forth a number of ways in which BellSouth's interfaces for ordering and provisioning, maintenance and repair, and billing all fail to offer CLECs access comparable to what BellSouth itself receives, noting repeatedly its concern with "the amount of manual intervention" that is still required by both CLECs (id. at 128) and BellSouth (id. at 119) to use the interfaces as BellSouth has deployed them. See id. at 116-30, 277-88.

The Department of Justice's Evaluation, in turn, builds not only upon the views and work of the Alabama, Georgia, and Florida commissions, but upon all of the comments and evidence submitted to date in this proceeding. DOJ Evaluation at 25-31 and App. A at A-8 to A-9, A-10 to A-30. Following the Commission's two-part inquiry, but focusing only upon pre-ordering and ordering functions, the Department of Justice lays out in considerable detail many of the

significant problems that afflict BellSouth's systems and prevent entrants from being able to compete with BellSouth on fair terms. See id. at A-10 to A-30. The Department's three overarching conclusions (Evaluation at 28-29) -- (1) that "BellSouth's present application falls well short of satisfying the standards articulated by the FCC"; (2) that "much additional work remains to be done" to address "potentially serious system inadequacies"; and (3) that OSS problems should "be resolved before the BOCs enter the interLATA market" because "[r]egulatory solutions in this area will be exceedingly difficult if the BOCs themselves have no incentives to resolve these problems" -- are each fully supported by the voluminous record submitted by the commenting parties.[10]

Although the Department of Justice confined its comments to the inadequacy of BellSouth's pre-ordering and ordering interfaces, the comments of AT&T, MCI, and Sprint demonstrate that BellSouth's interfaces for repair and maintenance and for billing also are fundamentally flawed. Of the two interfaces BellSouth uses for repair and maintenance, the TAFI interface is inherently discriminatory because, like BellSouth's LENS interface, it is not a "standard system-to-system interface but rather [a] proprietary graphic user interface[]" that requires dual data entry,[11] and the EBI interface "is not currently available for repair of

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[10] See e.g., AT&T Comments at 23-37 & Bradbury Aff.; MCI Comments at 10-38 & King Decl.; Sprint Comments at 9-16; DOJ Evaluation 25-30 & App. A; WorldCom Comments at 4-10 & Ball Decl.; LCI Comments at 1-10 & Rausch Decl.; ASCI Comments at 41-47 & Falvey Aff.; Intermedia Comments at 15-36; Telecommunications Resellers Ass'n Comments ("TRA") at 26-30; CompTel Comments at 5-12.

[11] MCI Comments at 24-26; see AT&T Comments at 28; Sprint Comments at 15 (TAFI is "the functional equivalent of 'sending a facsimile transmission,' since it results in BellSouth employees retrieving the information, then manually re-entering it into BellSouth's own system").

ordinary resold lines or basic unbundled elements such as loops" and thus also fails to provide parity.[12]

As for billing, BellSouth has failed to provide accurate bills to CLECs or accurate daily usage feeds for CLECs to use in billing end users. As to the former, commenters reported "many major problems" with BellSouth's billing. See MCI Comments, King Decl. ¶¶ 213-14; Sprint Comments at 17-18 ("BellSouth has been unable to provide accurate bills to Sprint . . ."). As for daily usage feeds, BellSouth has agreed on paper to provide them in the industry standard format, but CLECs still do not in fact have parity of access to those records.[13] Accordingly, BellSouth provides none of the required OSS interfaces at parity.

Finally, the comments conclusively demonstrate BellSouth's failure to provide sufficient measures of its performance.[14] BellSouth not only provided measures that tended to disguise its poor performance,[15] but simply refused to provide "numerous significant measurements" that the Commission has made clear must be provided. DOJ Evaluation at 47; see also MCI

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[12] MCI Comments at 27 n.13; see generally AT&T Bradbury Aff. ¶¶ 122-32 (detailing other problems with TAFI and EBI).

[13] See e.g., MCI Comments, King Decl. ¶¶ 208, 212; AT&T Bradbury Aff. ¶¶ 218-22 (both describing lack of parity, including BellSouth's failure to provide daily usage feeds for all customers and the "major problems" with the billing records BellSouth has provided to date to CLECs).

[14] See DOJ Evaluation at 45-48, App. A., A-31 to A-36; AT&T Comments at 32-37; MCI Comments at 44-53; LCI Comments at 7-9; ACSI Comments at 48-50; ALTS Comments at 9-14; Intermedia Comments at 44-45; TCG Comments at 14-16; Hyperion/KMC Comments at 6-8.

[15] See, e.g., DOJ Evaluation at 46-47 (describing how BellSouth "is not providing actual installation intervals, [but is] instead relying on the 'percentage of due dates missed,'" a measurement which could "conceal a significant lack of parity" where installation intervals for CLECs are longer than for BellSouth's own retail operations).

Comments at 46 (BellSouth's "SGAT offers none of the performance measure reports" required by the Commission); ACSI Comments at 48-49 (BellSouth "steadfastly refused to share such performance monitoring and measurement information with ACSI"). Even apart from the inherent limitations in BellSouth's OSS interfaces, this failure to provide the requisite performance measurements and data merits denial of BellSouth's application.

C. BellSouth Has Not Made Unbundled Network Elements Available At Cost-Based Rates

BellSouth's failure to provide nondiscriminatory access either to unbundled network elements or to its OSS are sufficient, standing alone, to require rejection of BellSouth's application. But in ruling on this application, the Commission should not stop at either one of those points. It is important that this Commission also address BellSouth's failure to make its network elements available at cost-based prices.

As the Department of Justice correctly recognizes, in the absence of terms and conditions that make it economically viable to use unbundled network elements to serve customers, "many customers -- especially residential customers -- may not have any facilities-based competitive alternative for local service for a considerably long[] period of time." DOJ Evaluation at 24. Even if BellSouth were both willing and able to provide nondiscriminatory access to its network elements, that alone would not be enough to make UNE-based competition a reality. For such competition to develop in South Carolina, competitors need access to network elements at cost-based rates.

BellSouth's position is that the state commission's assertion that BellSouth's UNE prices are cost-based is "conclusive" and must -- as a matter of law -- be accepted by the FCC. Yet

even the SCPSC does not go this far. The SCPSC first claims that state commissions have "exclusive responsibility for setting local rates." SCPSC Comments at 7. It then maintains that "[a]fter a state commission has fulfilled this role, the FCC should give substantial weight to the determination made by the state in the course of making its own assessments under Section 271." Id. (emphasis added, citation omitted). Thus, unlike BellSouth, the SCPSC is willing to argue that its jurisdiction is exclusive only insofar as the "setting" of particular rates is concerned, and to concede that the FCC, in evaluating whether those rates are cost-based for purposes of section 271, must "mak[e] its own assessments" to which the state's findings are entitled only to "substantial weight." Id. As the other commenters supporting BellSouth are silent on this subject, only BellSouth espouses the radical position that the state's findings are conclusive.

This Commission should expressly and emphatically reject BellSouth's position in ruling on this application. As the comments of numerous parties reveal, no case will ever illustrate better than this one how crucial it is that this Commission exercise its statutory obligation to make an independent finding, pursuant to section 271, whether a BOC's UNE prices are in fact cost-based.[16] This is particularly so here, where, as the Department of Justice explains, the state commission admittedly "'has not adopted a particular cost methodology,'" and has not provided any "explanation of the costs" on which many of the rates it has approved purportedly are based or any "reasoned explanation" for the others. DOJ Evaluation at 41-42 (quoting SCPSC Compliance Order at 56); see AT&T Comments at 40-42. Indeed, to take just one

[16] See, e.g., Consumer Advocate Comments at 5-6 (UNE rates are "clearly not" cost-based); DOJ Evaluation at 40-44; ACSI Comments at 22-26; ALTS Comments at 20-22; AT&T Comments at 40-42; Intermedia Comments at 8-11; MCI Comments at 38-44; Sprint Comments at 18-21; TRA Comments at 24-26; Vanguard Cellular Comments ("Vanguard") at 14-15; WorldCom Comments at 17-18.

particular set of costs, it is undisputed that the record before the SCPSC contains absolutely no cost studies or other evidence whatsoever to support the non-recurring charges set forth in BellSouth's SGAT. Id. at 41. Thus, by asking this Commission to "find," pursuant to section 271(d)(3), that BellSouth's UNE-rates are cost-based solely by virtue of the unsupported assertions in the BellSouth-drafted SCPSC compliance order, BellSouth is asking this Commission to make a determination that could only charitably be described as arbitrary.

Congress did not bind the Commission to such a perverse course. As the Department of Justice observes, section 271 carefully distinguishes between the role of the state commission -- with which the Commission is to consult in making its checklist findings; the role of the Department of Justice -- whose views (unlike those of the state commission) are entitled to "substantial weight"; and the role of the Commission -- which has final and exclusive authority to make the "written determination" and "find[ing]s" necessary to rule upon a section 271 application, subject only to federal appellate review. See § 271(d)(2),(3); DOJ Evaluation at 14-16. To promote UNE-based competition in South Carolina and elsewhere, the Commission should make clear that UNE rates must be cost-based in reality as well as in name before this Commission will make any finding that UNE-related checklist obligations have been met.

D. BellSouth Has Not Made Resale Services Available As The Act Requires

The comments further confirm that BellSouth has failed to comply with its resale obligations. Most notably, BellSouth has imposed unlawful restrictions on the resale of contract service arrangements ("CSAs") in violation of § 251(c)(4), and has failed to offer a wholesale discount rate that excludes the portion of the incumbents' retail rates "attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange

carrier." § 252(d)(3). See AT&T Comments at 42-46. Only the SCPSC attempts, even in part, to defend BellSouth's position on resale issues.

1. With respect to CSAs, no commenter defends BellSouth's prohibition on resale of a CSA to end-users other than the one for which it was developed. Indeed, in light of the plain language of section 251(c)(4), the Texas Preemption Order,[17] and the obvious anticompetitive consequences of such a restriction, such a restriction is indefensible. See AT&T Comments at 42-43; AT&T/LCI Motion to Dismiss at 14-18.

2. BellSouth also refuses to offer any discount on resale of CSAs to existing CSA end-users. Id. The SCPSC contends that this refusal is justified because "CSAs, unlike ordinary retail offerings, are individually negotiated arrangements, [and thus] BellSouth does not bear ordinary marketing costs with respect to these services." SCPSC Comments at 10. This explanation is insufficient on its face, however, because a reasonable incumbent clearly would avoid substantial "marketing, billing, collection, and other costs" (§ 252(d)(3)) if a competitor resold one of its CSAs. For example, the incumbent LEC would avoid the costs it would otherwise incur in individually negotiating with particular end-users, identifying the end-user's needs and matching them with available CSAs, and in billing and collecting from that end-user. It is therefore clear beyond question that incumbents will avoid costs when competitors resell

[17] In the matter of the Public Utility Commission of Texas, CCBPol 96-13, et seq., Memorandum Opinion and Order, FCC 97-346, (rel. October 1, 1997) ("Texas Preemption Order").

CSAs. See Local Competition Order ¶¶ 948, 953;[18] AT&T/LCI Motion to Dismiss at 15-16 & n.11.

The SCPSC tacitly admits this fact. It nonetheless argues that "[i]t would be impossible for the Commission to determine on a case-by-case basis what additional discount, if any, is necessary to account for BellSouth's potential cost savings with respect to a particular CSA," and that it is "clear" that applying the 14.8 percent discount uniformly to all CSAs "would greatly overstate the costs avoided." SCPSC Comments at 10. But neither BellSouth nor the SCPSC has ever provided any analysis to show that the 14.8 percent discount rate would overstate the avoided costs of CSAs. Indeed, the avoided costs with individually negotiated CSAs might well require a higher discount because certain costs, such as those associated with the special billing arrangements often required by high-volume end-users, are typically quite substantial.

In any event, the fundamental point is that section 251(c)(4) imposes upon BellSouth the duty to make available at wholesale rates "any telecommunications service" offered to subscribers. Accordingly, to the extent BellSouth wishes to depart from the standard discount for a particular service, it is BellSouth's burden -- and not that of entrants -- to demonstrate that avoidable costs differ from that standard. To the extent a state commission would feel "burdened" by a CSA-specific analysis, the state could consider requiring the incumbent to propose discounts that would apply to multiple CSAs that were comparable in terms of avoided costs. What a state may not do, consistent with the plain language of section 251(c)(4), is

[18] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) ("Local Competition Order").

exempt an entire category of retail services amounting to hundreds of millions of revenue dollars from the wholesale discount requirement for no other reason than, at bottom, its belief that the standard established by Congress is too burdensome.

Finally, the SCPSC asserts that its decision with respect to the pricing of CSAs "is a matter squarely within the intrastate jurisdiction of the Commission." SCPSC Comments at 11. The SCPSC does not explain this assertion, and it may be that all that the SCPSC meant was that, apart from the FCC's jurisdiction over section 271, the SCPSC has jurisdiction to set the particular discount rate for CSAs. But regardless of what the SCPSC intended, it is plain that Congress did not grant to state commissions jurisdiction over the assessment of checklist compliance for purposes of decisions on interLATA authority. As previously noted, Congress granted this Commission exclusive authority to assess checklist compliance -- including compliance with the resale requirements of sections 251(c)(4) and 252(d)(3) -- and authorized the Commission only to "consult" with, but not necessarily to give "substantial weight" to, the views of the state commissions. See § 271(d)(2); see also supra page 19; AT&T Comments at 39-40; DOJ Evaluation at 14-16. Where, as here, a state commission simply defaults in its obligation even to set a rate that the plain language of the Act requires it to set, this Commission may not "defer" to such non-action, but must find that the checklist has not been complied with.

3. As for the 14.8 percent wholesale discount rate for non-CSA retail services, the SCPSC says only that this is an "appropriate" rate that also falls within its "intrastate jurisdiction." SCPSC Comments at 9, 11. That abnormally low discount rate thus remains largely unexplained, except for other statements by the SCPSC that indicate that it followed a methodology that this Commission expressly rejected as inconsistent with the Act. AT&T

Comments at 44-46.[19] And the SCPSC's assertion of exclusive jurisdiction is no more persuasive here than it is for CSA or UNE pricing. Thus, BellSouth has not shown that retail services are available at an appropriate discount as required by the Act.

E. The SCPSC Mischaracterizes CLEC Concerns About BellSouth's Checklist Noncompliance

The foregoing discussion of the checklist-related comments makes clear, as the Department of Justice put it, that "the evidence available in the present application falls well short of demonstrating compliance with several critical prerequisites for approval." DOJ Evaluation at 3. For the SCPSC, however, "the accusations levied [sic] by the CLECs did not override BellSouth's evidence of compliance with the checklist." SCPSC Comments at 12. It is plain, however, that the SCPSC's contrary conclusion rests on factual and legal assumptions that are demonstrably incorrect.

The SCPSC maintains that it "has always taken very seriously its responsibility to supervise the local telecommunications markets in South Carolina," and states accordingly that "we believe it to be a key fact that we have received no complaint charging that BellSouth has failed to live up to its obligations under any interconnection agreement in South Carolina." SCPSC Comments at 11. From this "key fact," the SCPSC concludes that CLECs do not have any "genuine issues concerning BellSouth's satisfaction of the Act's requirements," because if they did, "those issues would have been raised through the complaint mechanisms that are

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[19] See also Sprint Comments at 21-23; TRA Comments at 23-24; cf. Consumer Advocate Comments at 7 (terming 14.8 percent discount "scant").